Petition

81-1885

Supreme Court, U.S.
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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CBS INC. and
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,
GULF+WESTERN INDUSTRIES, INC.,
MCA INC.,
TWENTIETH CENTURY-FOX FILM CORP.,
WARNER COMMUNICATIONS INC. and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Respondents moved to quash subpoenas served upon them in two government antitrust actions under Fed. R. Civ. P. 45(b), which provides in relevant part that "the Court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena . . . or (2) condition denial of the motion upon the advancement . . . of the reasonable cost of produc[tion] . . . ." The district court enforced the subpoenas without ordering advancement of costs. A year later, after the subpoenas had been complied with, respondents made a "Renewed Motion for Costs." The district court denied that motion. The court of appeals reversed and remanded.

Under the above circumstances:

1. Did the court of appeals err in interpreting Fed. R. Civ. P. 45(b) and 26(c) to permit the award of reimbursement of discovery costs after compliance?

2. Did the court of appeals err in finding appellate jurisdiction to review the district court's ruling under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

IDENTIFICATION OF PETITIONERS' SUBSIDIARIES AND AFFILIATES PURSUANT TO SUP. CT. R. 28.1

American Broadcasting Companies, Inc.'s non-wholly owned subsidiaries and affiliates are: The Center For Curriculum Development; Chanel Films Inc.; Donovan Communications Inc.; Newton Falls Paper Mill Inc.; Sutro Tower Inc.; Anchor Music Ltd.; Anchor Record Production Ltd.; Anchor Records Ltd.

CBS Inc.'s non-wholly owned subsidiaries and affiliates are: April Music Publishing Company (Proprietary) Limited (South Africa); Music Publishing Co. of Australia Pty. Limited (Australia)*; Grammofonselkabs Distribution Centralen A/S (Denmark)*; CBS Records (Kenya) Limited; Music Service Center Gesellschaft m.b.H (Austria)*; CBS/SONY Inc. (Japan); Shorewood Packaging Company Limited (England)*; Gramophone Record Company (Proprietary) Limited (South Africa); Hodder Fawcett Limited (England); Shorewood Packaging Corp. of Canada Limited (Canada); CBS Gramophone Records & Tapes (India) Limited; CBS Enterprises (Nigeria) Limited; Igaku-Shoin/Saunders Ltd. (Japan).

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* Indirect subsidiary.

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WARNER COMMUNICATIONS INC. and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners CBS Inc. ("CBS") and American Broadcasting Companies, Inc. ("ABC") (collectively "the Networks") petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 22, 1982. Respondents are (1) five nonparty witnesses (collectively "the Studios")[1] in two parallel government antitrust actions brought against petitioners,[2] and (2) the United States of America, plaintiff in those actions.

[1] Columbia Pictures Industries, Inc., Gulf+Western Industries, Inc., MCA Inc., Twentieth Century-Fox Film Corp. and Warner Communications Inc.

[2] *United States v. CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.), and *United States v. American Broadcasting Companies, Inc.*, Civ. No. 74-3600-RJK (C.D. Cal.).

OPINIONS BELOW

The opinion of the court of appeals is reported at 666 F.2d 364 (9th Cir. 1982) and reproduced in the Appendix at 1a-17a.[3] The Order of the district court is unreported. It is reproduced at App. 18a-19a.

JURISDICTION

The court of appeals issued its opinion and entered judgment on January 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

Section 1291 of the Judicial Code, 28 U.S.C. § 1291, provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

Rule 26(c), Federal Rules of Civil Procedure, provides in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the

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[3] Throughout this petition, citations to the Appendix are cited "App.," citations to the Clerk's Record filed with the court of appeals are cited "CR," and citations to the Reporter's Transcript filed with the court of appeals are cited "RT." The Clerk's Record and the Reporter's Transcript will be made available to the Court No. 74-3600-RJK (C.D. Cal.).

scope of the discovery be limited to certain matters. . . .

Rule 45(b), Federal Rules of Civil Procedure, provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the Court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

STATEMENT OF THE CASE

1. Background

This petition arises from the Studios' demand that CBS and ABC reimburse them for $2.3 million in expenses that the Studios purportedly incurred in complying with subpoenas issued by the district court at the request of CBS and ABC, defendants in two parallel government antitrust actions.[4]

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[4] *United States v. CBS Inc.*, Civ. No. 74-3599-RJK (C.D. Cal.); *United States v. American Broadcasting Cos.*, Civ. No. 74-3600-RJK (C.D. Cal.). These actions were filed December 10, 1974, and terminated by consent decrees entered July 13, 1980, and November 14, 1980, respectively. A third companion action, *United States v. National Broadcasting Co.*, Civ. No. 74-3601-RJK (C.D. Cal.), also filed on December 10, 1974, was terminated on November 28, 1977, also by the entry of a consent decree.

Predecessor actions on substantially identical complaints had been commenced by the government against each Network in April 1972, but those complaints were dismissed without prejudice on November 13, 1974 by reason of the government's refusal to comply with discovery orders. *United States v. National Broadcasting Company*, 65 F.R.D. 415 (C.D. Cal. 1974). The present actions were commenced within weeks of the dismissal of the predecessor actions and on March 27, 1975 Circuit Justice Douglas stayed proceedings in the present actions pending the Supreme Court's disposition of the Networks' appeal from the District Court dismissal of

The government's case was based on its theory that each Network independently was a monopsonist and had used its purchasing power to depress the price of television programming purchased from outside program suppliers and to acquire various financial interests in such programming. The supposed effect of this conduct had been to inflict "undue hardship" on program suppliers by not according them payment "commensurate" with the success of their programs. As the district court recognized, the purpose of the litigation was to "improve the lot" of suppliers of television entertainment programming, including the Studios. *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1145 (C.D. Cal. 1978). The Networks' discovery was directed to the government's intended trial witnesses and tracked the government's allegations.

The Studios, who characterized themselves as "principal beneficiaries" of the litigation,[5] were not merely passive bystanders. Indeed, prior to the commencement of the government's actions four of the five Studios had

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the predecessor actions insofar as such dismissal was without prejudice. No. A-774 (74-1001) (U.S., March 27, 1975) (Order of Douglas, J.). The Supreme Court dismissed the Networks' appeal for lack of jurisdiction. 421 U.S. 940 (1975).

When, in November 1976, a proposed consent decree in the NBC case was submitted to the District Court for consideration under the Tunney Act, both the Studios and CBS sought to intervene for the purpose of opposing entry of the proposed decree as contrary to the public interest. Both motions to intervene were denied. *United States v. National Broadcasting Co.*, No. 74-3601-RJK (C.D. Cal., June 20, 1977 and December 2, 1977), *aff'd without published opinion*, 603 F.2d 227 (9th Cir.), *cert. denied*, 444 U.S. 991 (1979). Mandamus petitions filed by ABC and CBS to require the district court to hold a Tunney Act hearing pursuant to 15 U.S.C. § 16(f) were denied by the Ninth Circuit. *American Broadcasting Cos. v. Kelleher*, No. 77-4057 (9th Cir., April 12, 1978); *CBS Inc. v. United States District Court*, No. 77-3975 (9th Cir., April 12, 1978), *cert. denied*, 444 U.S. 830 (1979).

[5] Brief of *Columbia Pictures Industries, Inc., et al.* in *United States v. National Broadcasting Co.*, No. 78-1068, at 6, 8, 41 (9th Cir. 1978), *cited in* CR 45, at 20.

started a private antitrust action against CBS and ABC in 1970 that raised substantially the same issues as the government's subsequent complaints.[6] Once the government litigation was under way, the Studios' action was stayed by stipulation and order pending the outcome of the government actions.[7] In the interests of economy of effort, discovery had in the private action was made available for use in the government action.[8]

Further, the Studios played an active role in the prosecution of the government's case. They established a steering committee to coordinate the "[p]reparation and cooperation with the Government" and the "preparation of witnesses for this litigation."[9] The Studios also made prospective witnesses available to the government (but not defendants) for interviews and voluntarily produced documents to the government, including documents initially withheld from production to defendants on grounds of privilege.[10]

2. The Broad Scope of the Government's Intended Proof

In an effort to narrow as far as possible the scope of the issues tendered by the broad allegations of the government complaints and, correlatively, the scope of the discovery required of the government witnesses, defendants sought by interrogatories to have the government specify

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[6] *Columbia Pictures Industries, Inc. v. American Broadcasting Cos.*, 70 Civ. 4204 (ELP) (S.D.N.Y.). Twentieth Century-Fox did not participate in the private antitrust action.

[7] CR 45, Exhibit G, at 83.

[8] CR 28; RT of 12/4/78, at 35-37; RT of 1/11/79, at 11-12.

[9] CR 45, Exhibit I, at 91-95. *See also* CR 45, Exhibit I, at 87, a March 9, 1979 memorandum to the chief executives of the Studios from the president of their trade association noting that the "member company steering committee" is "coordinating our cooperation with the government in its suits against ABC and CBS."

[10] CR 45, Exhibit J, at 90.

its claims and indicate which of the thousands of transactions between CBS or ABC and the Studios the government intended to rely upon at trial. Finding the government's answers to the Networks' interrogatories insufficient, and indeed "frivolous" (RT of 5/24/77, at 6), the district court required the government to file a memorandum specifying its intended claims and proof at the risk of preclusion at trial.

The first installment of this memorandum, the government's "Identification of Evidence," was filed on September 13, 1977.[11] Thereafter, the government filed extensive supplements on July 3 and August 16, 1978.[12] The Identification of Evidence, as supplemented, aggregated more than 200 pages and made it clear that the government planned to present evidence covering a thirty-year period, challenging virtually every aspect of CBS's and ABC's dealings with program suppliers and talent. The government specifically put in issue some four hundred transactions,[13] most of which were with the Studios. Virtually all of those transactions entailed the negotiation and renegotiation of complex production agreements for programming valued at hundreds of thousands or, more often, millions of dollars. Although the specification of issues achieved in the Identification of Evidence was somewhat ambiguous, it nonetheless indicated the scope of discovery that would be required of plaintiff's witnesses.

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[11] Identification of the Evidence in Support of the Government's Contention that CBS & ABC Have Violated Sections 1 and 2 of the Sherman Act, Attachments 1 and 2 thereto and Exhibits A-D thereto, CR 74-77.

[12] *See* CR 80-81. Numerous further revisions and supplements were submitted by the government between January and November 1979. *See* CR 107-19.

[13] By putting these transactions in issue to show that each Network pursued a uniform "course of conduct," the government effectively put in issue virtually every transaction, since to disprove this charge, CBS and ABC would be obliged to show, *inter alia*, the myriad of other transactions inconsistent with the government's charges.

3. The Networks' Nonparty Discovery and the Studios' Response

In August and September 1978, CBS and ABC served subpoenas on, *inter alia*, the five Studios and seventeen of their employees who had been identified by plaintiff as intended trial witnesses. On October 30, 1978, the Studios filed a motion to quash the subpoenas in their entirety, pursuant to Fed. R. Civ. P. 45(b) (CR 21). The sole relief requested in the Notice of Motion was quashing of the subpoenas. In their Memorandum of Points and Authorities in Support of Motion to Quash, however, the Studios stated that they "intend to preserve and reserve all rights to . . . request that the Networks advance the costs of search, review and copying at the time that revised subpoenas are filed or that the [Studios] are obliged to respond to the outstanding subpoenas" (CR 21, at 17-18). The Studios did *not* purport to reserve the right to move, after compliance, for reimbursement of costs.

The district court considered the Studios' motion to quash in the course of several pretrial conferences held during a four-month period during which it also explored ways to narrow materially the issues the government raised in its Identification of Evidence so as to reduce the scope of the nonparty discovery the defendants needed and, hence, the claimed burden on the Studios.[14] For their part, ABC and CBS offered to narrow their subpoena to the extent that the government narrowed its discovery demands (CR 86). During these proceedings, the district court made clear to counsel for the Studios that the subpoenas would be enforced in substantial part since, in light of the parameters of the government's case, the subpoenas were neither unduly broad nor overly burdensome. The district court stated:

> The files here reflect that the burden and oppression imposed upon the defendants in this case by the government with respect to the charges made

[14] RT of 12/4/78, at 37-50; Order, 12/15/78, at 2-3, CR 26.

> and the areas of proof, and especially the areas of defensive proof necessary to these defendants, make clear that they must pursue the course they are pursuing with these third parties. . . . [T]he Court is satisfied upon the whole record before the Court that there has been the kind of showing necessary on the part of these defendants to justify their pursuit of deposition inquiry, subpoena service, and otherwise with respect to all of the matters here involved. . . .
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> * * * *
>
> And this record persuades this Court that the boundaries [of the triable issues] being as broad as they are embrace within them all that the defendants here seek by way of discovery as against your client and the other deponents (RT of 12/4/78, at 7-8).

At a later pretrial hearing, the district court also admonished counsel for the Studios to "get a leg up on the production of these documents" so that production could be accomplished expeditiously, because "when the Court lays down the date upon which that production completely must be accomplished, the Court will have very much in mind that you are supposed to be working on it beginning at least today if not some time ago" (RT of 1/11/79, at 164-65).

Faced with such strong indications that the district court intended to enforce the subpoenas in large part, the Studios decided to exercise whatever rights they had reserved to seek payment of costs. In their "Supplemental Reply Memorandum in Support of Motion to Quash Subpoenas," [15] the Studios "urge[d the District] Court to . . . condition production of documents upon the Defendants' reimbursement of all or substantially all of the costs of such production." Later, in a "Supplemental Memorandum of Non-Party Witnesses Regarding Costs of Produc-

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[15] Filed 2/14/79, at 12-14, CR 93.

tion of Documents and Status of Production of Documents," [16] the Studios again "urge[d the District] Court to enter an order . . . that the defendants reimburse the Non-Party Witnesses for the cost of document production in these actions."

On March 6, 1979, the district court finally ruled on the Studios' motion to quash. The Court (1) limited the subpoenas with the consent [17] of the defendants predicated on a concomitant narrowing of the government's evidence at trial, (2) enforced the subpoenas as modified and (3) otherwise denied the Studios' motion. It ordered that document production be completed by the Studios by May 11, 1979.[18] The Order did not direct payment of costs or indicate in any way that that issue was subject to future order. The issue of payment of costs was not raised again until the Studios made their "Renewed Motion for Costs" a year later in March 1980.

The Studios failed to complete production by May 11, 1979. Rather, they obtained four extensions of the deadline.

On May 24, 1979, the district court, observing that the Studios "have had more than their share of time to produce, and more than their share of the Court's patience" extended the document production deadline to June 22, 1979 and imposed sanctions of $1,000 for each day beyond June 22 required to complete production (Order, 5/24/79, at 2-3, CR 99).

On June 12, 1979, the district court granted the Studios an extension of the document production deadline to July 31, 1979, continuing the $1,000 per day sanction after that date (Minute Order, 6/12/79, CR 102).

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[16] Dated 2/23/79, at 4, 7, CR 31.

[17] RT of 1/11/79, at 72, 102.

[18] Order, 3/6/79, CR 32, App. 20a.

On November 2, 1979, the Studios having still not completed document production,[19] the district court, on defendants' motion,[20] ordered them "forthwith to comply with the previous Orders of this Court" requiring compliance with defendants' subpoenas as modified (Order, 11/2/79, at 2, CR 126).

On January 10, 1980, production "forthwith" not having taken place, the district court ordered the Studios to complete document production by February 6, 1980 (Order, 1/10/80, CR 42).

Defendants' depositions of Studio employees, which pursuant to the district court's Order[21] commenced before the Studios' document production, were similarly marked by dilatory and abusive conduct on the part of the Studios and their counsel. At the outset, defendants were forced to seek the district court's aid to compel a reluctant Studio deponent to testify at all. The district court found "[t]hat the position taken . . . by" that deponent was "wholly without merit" and characterized his declaration submitted to the Court as "artful avoidance" (RT of 11/8/78, at 9, 20).[22] During the course of the depositions, defendants were subjected to a barrage of time-consuming and improper interruptions and obstructions, including instructions not to answer by the witness' counsel. On four occasions, defendants sought and obtained court or-

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[19] The Studios had three months before represented to the district court that they had "complied fully" with defendants' subpoenas as modified (Status Report of Non-Party Witnesses Regarding Document Production, filed 8/10/79, at 2, CR 36).

[20] Motion for an Order Enforcing This Court's Orders of March 5, May 24 and June 12, 1979, and for Sanctions, filed 9/24/79, CR 105, 106.

[21] Order, 10/25/78, CR 19.

[22] *See* Defendants' Joint Statement Regarding the Refusal of Donald Sipes to be Deposed, filed 11/7/78, CR 82; Statement of Position of Donald Sipes, Declaration of Donald Sipes, Declaration of Gail M. Title, filed 11/7/78, CR 83; Order, 11/9/78, CR 84.

ders directing witnesses to answer 162 such questions—most recently in the very Order denying the Studios' "Renewed Motion for Costs." On three of these occasions, the district court awarded defendants the costs of the motions as sanctions.[23]

4. The Studios' "Renewed Motion for Costs"

Although the Studios filed several motions and status reports during discovery, not until March 14, 1980, when document production was substantially completed, did they again raise the issue of discovery costs. On that date the Studios filed a motion including, *inter alia*, a "Renewed Motion for Costs," seeking an order "requiring Defendants to reimburse [them] for the costs of discovery . . . pursuant to Fed. R. Civ. P. 45(b)(2)."[24] The Studios sought some $2.3 million in costs, including $1.1 million in outside counsel fees for services in connection with both document production and deposition testimony. Defendants opposed the motion on the grounds (1) that the motion was untimely, (2) that the discovery in question had been reasonable, (3) that many of the costs the Studios had allegedly incurred were the result of their own improper resistance to discovery and (4) that it would be particularly inappropriate to reimburse the Studios' discovery costs where, as here, they were intended to be the principal beneficiaries of and had a substantial private stake in the plaintiff's case (CR 45). In particular, CBS and ABC argued that the Studios

> have previously asked the [District] Court to grant them costs of making discovery . . . and, we believe, the [District] Court has fully considered and re-

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[23] Order, 1/16/79, CR 89; Order, 3/12/79, CR 96; Order, 3/27/80, CR 48, App. 18a-19a. The $2.3 million in costs the Studios seek apparently includes counsel fees for the abusive and improper conduct at depositions, costs of opposition to the Networks' motions to compel and possibly the $3108.80 awarded to the Networks as costs of their motions to compel.

[24] CR 44, at 2.

> jected that request . . . . To the extent, however, that the [Studios] now move for costs, that motion is clearly untimely under Fed. R. Civ. P. Rule 45(b) (CR 45, at 14 n.*).

The district court, in a Minute Order issued March 27, 1980, declined to award costs (CR 48, App. 18a-19a). The Studios appealed from the March 27, 1980 Order.[25]

5. The Ninth Circuit's Opinion

On January 22, 1982, a panel of the court of appeals for the Ninth Circuit reversed and remanded. The court of appeals held that the March 27, 1980 interlocutory order denying costs was appealable under the "collateral order" exception to the finality rule established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (App. 9a-14a).

It further held that notwithstanding its unambiguous language to the contrary, Fed. R. Civ. P. 45(b)(2) authorizes the postcompliance award of reimbursement of costs. The court of appeals stated that the Studios' March 14, 1980 motion for costs under Fed. R. Civ. P. 45(b)(2) was timely filed, even though made well after the completion of document production, because the Studios had "expressly reserved the right to seek post-compliance reimbursement in their [October 30, 1978] motion to quash" (App. 7a). The court of appeals disregarded the fact that whatever rights were "reserved" had been asserted in the Studios' supplemental memoranda,[26] which were filed prior to the district court's March 6, 1979 ruling, and which explicitly sought payment of costs (*see supra* pp. 8-9).

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[25] CBS's and ABC's Motion to Dismiss the Appeal for Lack of Jurisdiction was denied by the Court of Appeals for the Ninth Circuit on October 20, 1980, without prejudice to the parties raising the issue of jurisdiction in their briefs.

[26] CR 93, CR 31.

The court of appeals further indicated that this reservation had met with the "tacit approval" of the parties and the district court when, on March 6, 1979, the district court ordered compliance with the subpoenas without granting the Studios' request for payment of costs (App. 7a). The court of appeals based this finding on supposedly "corroborat[ing]" facts which reflect a misreading of the record. First, the court of appeals suggests that the Networks' lack of reaction to the Studios' "five Status Reports detailing, *inter alia*, the costs they were incurring during the course of document production" and "the fact that, during [document production], the studios reiterated their intention of seeking reimbursement following production" (App. 7a) indicated acquiescence in a reserved right to seek postcompliance reimbursement (*Id.*). However, the court of appeals failed to note that three of the five Status Reports (CR 29-31, 34) were filed prior to the district court's March 6, 1979 ruling on the motion to quash. The fourth Status Report, filed May 11, 1979 (CR 33), mentioned the costs the Studios were incurring only in an effort to convince the district court that their production efforts were diligent and that it should extend the then-effective May 11, 1979 deadline for the completion of document production. The fifth Status Report (CR 36) made no mention of costs in any context.[27] Moreover, the Studios never stated any intention of seeking payment of costs between the district court's ruling of March 6, 1979 and March 14, 1980.

The court of appeals also based its conclusion on a stipulation required by local court rules, filed the day before the district court issued its March 27, 1980 Order, which supposedly indicates waiver of the untimeliness

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[27] Needless to say, even if the Status Reports had expressed an intention to seek reimbursement of costs, lack of Network objection cannot be a proper basis for an inference that the Networks acquiesced in the Studios' right to do so. The Networks were "never unambiguously called upon to submit a formal plea." *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 334 (1971).

point because it "contains a brief synopsis of the networks' arguments on the [reimbursement] issue, none of which included the issue of timeliness" (*Id.* at 7a-8a). However, there was no waiver of the point. The court of appeals ignores the Networks' full memorandum in opposition to the motion, filed two weeks earlier, in which CBS and ABC argued that the motion should be denied because

> the [Studios] have previously asked the [District] Court to grant them the costs of making discovery . . . and, we believe, the [District] Court has fully considered and rejected that request (Order, 3/6/79). To the extent, however, that the [Studios] now move for costs, that motion is clearly untimely under Fed. R. Civ. P. Rule 45(b) (CR 45, at 14 n.*).

As an alternative to its conclusion based on Rule 45 (b), the court of appeals concluded that postcompliance reimbursement could also be justified under Fed. R. Civ. P. 26(c) (App. 8a-9a).

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the conduct of discovery and allocation of the cost of discovery, particularly in large and complex litigation, which have not been, but should be, settled by this Court.

First, the court of appeals' novel and unprecedented interpretation of Fed. R. Civ. P. 45(b) and 26(c), permitting application for and allowance of reimbursement of costs after completion of document production, conflicts with the express language of the rules themselves and with the law in another circuit. The discovery rules, for sound reasons, require that the matter of payment of costs of subpoena compliance be determined before compliance takes place. The Ninth Circuit's procedure will impose unfair burdens on litigants and seriously complicate and protract discovery proceedings.

Second, the Ninth Circuit's exercise of appellate jurisdiction by extending the doctrine of *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541 (1949), to this case is in conflict with applicable decisions of this Court and out of harmony with the approach taken by the majority of the circuits. The Ninth Circuit's approach permits a subpoenaed nonparty to appeal at any time, even after compliance, from a district court's denial of a motion to quash that fails to condition the denial on advancement of the costs of producing documents. Further, this appeal can be taken without a contempt citation as ordinarily required by the finality rule.

The net effect of the Ninth Circuit's decision will be to burden the courts of appeals with innumerable appeals from nonparty discovery orders in litigation of every size and character.

I. The Ninth Circuit Erroneously Interpreted Rules 26 and 45 in Conflict With Their Language and a Tenth Circuit Opinion

Fed. R. Civ. P. 45(b) provides:

> [T]he court, upon motion made promptly and *in any event at or before the time specified in the subpoenas for compliance therewith*, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) *condition denial of the motion upon the advancement* by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, paper, documents, or tangible things (emphasis added).

The Ninth Circuit's interpretation of Rule 45, which permits a subpoena recipient unilaterally to reserve the right to seek postcompliance reimbursement and, absent express direction by the district court, to exercise that right over one year after the court rules on a motion to quash without conditioning denial on advancement of costs, stands the plain language of Rule 45 on its head. It ignores the Rule's requirement that the motion for costs be made "in any event at or before the time specified in the sub-

poena for compliance." Instead, the court of appeals would permit a motion to be made sixteen months after the time specified in the subpoena for compliance and seven months after the movants had declared production complete (*see supra* p. 10 n.10). It also ignores the Rule's procedural limitation to situations in which the court "condition[s] denial of the motion [to quash] upon the advancement" of costs. The Ninth Circuit's reading of Rule 45(b) stands in stark contrast to this Court's observation that "[w]e [the Federal courts] have no power to rewrite the Rules by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

Moreover, the court of appeals' interpretation is inconsistent with the essential purpose of Rule 45(b)(2)—to provide a means short of quashing or modifying a subpoena by which a district court can ensure that discovery demands are not "unreasonable or oppressive." To be effective, this alternative must be employed at the time the court considers the reasonableness of the subpoena. Only by a ruling in advance of compliance that the discovering party must bear the costs incurred in its satisfaction can the district court fairly and equitably provide a pecuniary incentive to limit the scope of a potentially "unreasonable" or "oppressive" subpoena. By contrast, the court of appeals' interpretation results in highly inequitable burdens on the discovering party because, if fairly apprised that it would be required to bear the witnesses' discovery costs as well as its own, the discovering party might well determine to forego wholly appropriate discovery as too costly.[28] These considerations are important not only in large corporate litigation, but also in actions involving plaintiffs and defendants of more modest means.

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[28] *Cf. Celanese Corp. v. E.I. duPont de Nemours & Co.*, 58 F.R.D. 606, 612 (D. Del. 1973); *Collins & Aikman Corp. v. J.P. Stevens & Co.*, 51 F.R.D. 219, 221 (D.S.C. 1971).

Based on the above rationale, the Federal Trade Commission recently denied a postcompliance motion for costs under an FTC Rule of Practice analogous to Rule 45(b). The FTC held that "requests for reimbursement for compliance costs already incurred are untimely and inconsistent with the Commission's rules, because they deprive the [Administrative Law Judge] and the proponent of the subpoena of the choice of means by which to ameliorate unreasonable burdens." [29] Although some courts have deferred determination of the precise amount the subpoenaing party will have to pay until production is complete,[30] we are aware of no case in which a party was charged with discovery costs without being fairly apprised by the court, prior to the commencement of discovery, of its potential responsibility for all or some part of these costs.

Another consideration present here supports adherence to the requirement of Rule 45(b)(2) that application for costs be made no later than the time for compliance. A respondent eager to resist a subpoena—whether out of hostility to the party issuing it or for other reasons—will recognize that its suggestion that costs be allowed will tend to undermine its argument that the subpoena be quashed, insofar as it is based on a claim that compliance would be unreasonably burdensome and expensive. Where the overriding objective (based here on zealous partisanship for the government's cause) is to preclude discovery altogether, a respondent will be reluctant to urge that its motion to quash be denied under Rule 45(b)(2) on the condition that the party seeking discovery bear the costs. Only when the motion to quash

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[29] *International Telephone & Telegraph Corp.*, 3 TRADE REG. REP. (CCH) ¶ 21,810, at 22,035 (FTC, March 13, 1981).

[30] *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1034 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *United States v. Farmers & Merchants Bank*, 397 F. Supp. 418, 421 (C.D. Cal. 1975); *Celanese Corp. v. E.I. duPont de Nemours & Co.*, 58 F.R.D. 606 (D. Del. 1973).

is denied will it become attractive to seek the alternative remedy of recovering costs.[31] The language of Rule 45(b) is intended to preclude such game-playing tactics and requires respondents to be forthright with respect to the grounds of their request before they can be relieved of the burdens entailed in compliance with subpoenas. Any other approach is not only unfair to the litigants but unnecessarily wasteful of the time and resources of both the courts and the parties.

As an alternative ground for its holding that the Studios could obtain postcompliance reimbursement of costs, the Ninth Circuit relies on Fed. R. Civ. P. 26(c), which provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . .

The court of appeals draws support from the language of Rule 26(c) "authorizing courts to make 'any order which

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[31] That is precisely the strategem that the Studios sought to pursue here. Eager to assist the government in prevailing and to curtail the evidence available to defendants, the Studios and the government initially sought to quash the subpoenas in their entirety (CR 16, CR 21). Only after they discovered (at the December 4, 1978 pretrial conference discussed *supra* pp. 7-8) that the district court would sustain and enforce the subpoenas as seeking matter entirely appropriate to the issues to be litigated did the Studios first suggest that they be awarded costs on the theory that half a loaf was better than none.

justice requires to protect a party or person from annoyance, embarrassment, oppression, *or undue burden or expense*'" (App. 9a) (emphasis supplied by court). However, this language is taken out of context. The court of appeals fails to note that all eight examples of appropriate orders under Rule 26(c) presuppose that the discovery has not yet been made. Thus, the construction of the rule indicates that the protective orders it contemplates are to be issued precompliance. Moreover, even if Rule 26(c) were not limited to precompliance situations, it is wholly inappropriate to interpret that Rule of wide application to grant power that Rule 45(b)(2)—designed expressly to deal with payment of nonparty costs of subpoena compliance—withholds.

The Ninth Circuit's construction of Rule 26(c) also conflicts with the Tenth Circuit's opinion in *United States v. Portland Cement Co.*, 338 F.2d 798, 803 (10th Cir. 1964). In that case, a party sought to condition discovery on its right to postcompliance reimbursement if it won the case. The trial court did not rule on the request, but the discovery proceeded. On appeal, the Tenth Circuit reversed, holding that the award could not be sustained under then-effective Fed. R. Civ. P. 30(b) (App. 22a), predecessor of present Rule 26(c), because the party "did not obtain a conditioning order before incurring the expenses" for which it sought reimbursement. The Tenth Circuit stated that "[a]s we read [the predecessor of Rule 26(c)] the protective orders there mentioned must precede the taking of the depositions" (338 F.2d at 803).

Based on the foregoing, this Court should grant certiorari to resolve a conflict between the decision of the Ninth Circuit herein and the prior decision of the Tenth Circuit and to correct the Ninth Circuit's misreading of the Federal Rules of Civil Procedure, "rules which by law it is the duty of this court to formulate and put in force."[32]

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[32] *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) (quoting *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706 (1927)).

II. The Ninth Circuit Exceeded Its Jurisdiction by Improperly Invoking the "Collateral Order" Doctrine

The Ninth Circuit's exercise of appellate jurisdiction here was an expansion of the "collateral order" doctrine established by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Applicable decisions of this Court and decisions in the majority of the circuits apply the finality rule of 28 U.S.C. § 1291 to nonparty discovery orders.[33] This rule is drawn from the express language of the Judicial Code, 28 U.S.C. § 1291. As this Court observed last term, controlling precedents "generally deny review of pretrial discovery orders . . . . Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (citations omitted).

That rationale is plainly applicable here. The Studios had an appropriate route to appellate review which they consciously forewent. When the district court, on March 6, 1979, ordered document production without conditioning denial of their motion to quash upon the payment of costs, they could have sought review by refusing to produce the documents and appealing from a contempt citation. Thus, the court of appeals' application of *Cohen*, based on its

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[33] 28 U.S.C. § 1291; *see United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States*, 201 U.S. 117 (1906); *David v. Hooker, Ltd.*, 560 F.2d 412, 416 (9th Cir. 1977); *Kaufman* v. *Edelstein*, 539 F.2d 811, 813-14 (2d Cir. 1976); *Ryan v. CIR*, 517 F.2d 13, 18-20 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975); *Gialde v. Time Inc.*, 480 F.2d 1295, 1300-01 (8th Cir. 1973); *United States v. Anderson*, 464 F.2d 1390 (D.C. Cir. 1972); *Borden Co. v. Sylk*, 410 F.2d 843, 845-46 (3d Cir. 1969); *United States v. Fried*, 386 F.2d 691, 695 (2d Cir. 1967). *Contra Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 996 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

conclusion that the Studios had no other way of seeking review, is an unwarranted intrusion on the finality rule. This Court has clearly directed that any exception to the "finality rule" must be narrow in scope and apply to only a small class or orders. *See, e.g., Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 374; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Even if one accepts the premise of the court of appeals that it is preferable to permit a party not awarded costs to produce the documents without waiving the right to appeal the failure to condition production on the payment of costs, then the Studios had a right of appeal on March 6, 1979. They failed to exercise that right within the sixty days permitted by Fed. R. App. P. 4(a). Then, in an apparent effort to revive their time for appeal, they filed a belated "Renewed Motion for Costs" a year later (CR 44). This motion, effectively a motion for reconsideration, was of course untimely under Fed. R. Civ. P. 59.[34]

The procedure advocated by the court of appeals will encourage frequent and fragmented appeals from orders denying discovery costs, clogging the appellate courts with the very types of interlocutory appeals which the finality rule was designed to avoid. As the court stated in *Borden Co. v. Sylk*, 410 F.2d 843, 846 (3d Cir. 1969), "It would constitute the courts of appeals as second-stage motion courts reviewing pretrial applications of all non-party witnesses alleging some damage because of the litigation."

Moreover, contrary to the requirements of orderly litigation and prejudicially to the discovering party, the timing of the appeal will be wholly within the discretion

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[34] Of course, this untimely motion for reconsideration would not give rise to a right of appeal of the original denial. *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 750 (7th Cir. 1976); *Stiller v. Squeez-A-Purse Corp.*, 251 F.2d 561, 563 (6th Cir. 1958).

of the witness. All the witness need do to preserve this right is: (1) claim the right to seek postproduction reimbursement of costs but file no motion regarding this claimed reservation; (2) seek preproduction advancement of costs; (3) if preproduction advancement is not granted, produce the documents, then, at some convenient time, months after production is complete, seek postproduction reimbursement; and (4) if that motion is denied, file an appeal. The inequity created by allowing the witness to control the timing of the appeal is clear in this case. With the issuance of the trial court's order directing discovery without cost conditioning, the Networks reasonably believed, based on longstanding and settled principles of law, *see Alexander v. United States*, 201 U.S. 117 (1906); *Cobbledick v. United States*, 309 U.S. 323 (1940); *United States v. Ryan*, 402 U.S. 530 (1971), that, with commencement of production, the issue was fully and finally resolved. Thus, the Networks had no reason to police the Studios' unnecessarily expensive document production program. To be charged now with those excessive costs based on retroactive application of unjustifiable deviations from settled law is highly unfair to the Networks.

To avert the flood of interlocutory appeals and the inherent inequity which will result from the approach now authorized by the Ninth Circuit, particularly exemplified in this case, this Court should grant certiorari and direct that, consistent with its long-standing and settled finality rule, subpoena recipients ordered to produce documents without having been granted production costs must risk contempt if they wish to appeal the failure of the district court to award costs. In the alternative, this Court should order that their failure to file a timely appeal of the district court's discovery order of March 6, 1979 bars the Studios from appealing after reraising the issue after making production.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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April 12, 1982

Appendix

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 80-5345, 80-5346

UNITED STATES OF AMERICA,
Plaintiff
and

COLUMBIA PICTURES INDUSTRIES, INC., GULF AND WESTERN INDUSTRIES, INC., MCA, INC., TWENTIETH CENTURY-FOX FILM CORPORATION and WARNER COMMUNICATIONS, INC.,
Witnesses/Appellants,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Defendant/Appellee.

UNITED STATES OF AMERICA,
Plaintiff,
and

COLUMBIA PICTURES INDUSTRIES, INC., GULF AND WESTERN INDUSTRIES, INC., MCA, INC., TWENTIETH CENTURY-FOX FILM CORPORATION and WARNER COMMUNICATIONS, INC.,
Witnesses/Appellants,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant/Appellee.

Argued and Submitted Oct. 6, 1981

Decided Jan. 22, 1982

Appeal from the United States District Court
for the Central District of California

Before GOODWIN, NELSON and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

This is a consolidated appeal by five non-party witnesses who were subpoenaed to produce massive quantities of documents and deposition testimony for use in antitrust suits brought by the Justice Department. The issues are whether this court has jurisdiction to review the district court's order denying the nonparty witnesses' post-production motion for reimbursement of their substantial discovery costs, and, if so, whether the denial of reimbursement without stated reasons constituted an abuse of discretion.

We conclude that the order was final as to these nonparty witnesses, and thus appealable under 28 U.S.C. § 1291, by operation of the collateral order doctrine first articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We further conclude that, in light of the district court's failure to articulate findings of fact or conclusions of law in support of its decision, the record before us affords an insufficient basis for determining whether the court properly exercised its discretion in denying the nonparties any reimbursement for their discovery costs. Accordingly, we reverse and remand.

I.

Facts

Appellants are five producers of television programming (the "studios")[1] who were subpoenaed as nonparty witnesses by CBS and ABC (the "networks") to produce extensive pretrial discovery material for use in antitrust suits brought against the networks by the Justice De-

[1] Columbia Pictures Industries, Inc.; Gulf & Western Industries, Inc.; MCA, Inc.; Twentieth Century-Fox Film Corporation; and Warner Communications, Inc.

partment. The Government's nearly identical complaints against the networks principally challenged the manner in which the networks acquired prime-time programming from independent producers such as the studios.

The first three and one-half years of the litigation consisted primarily of disputes over jurisdiction, the legal sufficiency of the Government's case, and the Government's discovery demands on the networks. The district court eventually ordered the Government to identify "with particularity" each of its claims and the evidence it intended to offer. The Government's "Identification of Evidence" indicated that it planned to challenge a wide range of the networks' dealings with program suppliers and talent, specifically putting in issue several hundred transactions spread over more than a twenty-year period.

In August and September 1978, the networks served subpoenas duces tecum and ad testificandum upon the nonparty studios and a number of their officers and employees who the Government had identified as witnesses. Consistent with the breadth of the Government's case, the networks' discovery demands were extensive. The subpoenas sought production of most of the material in the studios' control that pertained to production of television programming and theatrical films since 1960.

The studios moved to quash the subpoenas pursuant to Fed.R.Civ.P. 45(b). In the motion, the studios expressly "reserved" the right to seek reimbursement of discovery costs if production was ordered. The studios subsequently filed memoranda in support of their motion to quash in which they specifically requested the networks to pay at least some discovery costs.

The district court ruled on the motion to quash on March 6, 1979, enforcing most of the subpoenas with limited modifications and setting a deadline for compli-

ance. The order contained no mention of costs. The studios did not seek timely reconsideration or appellate review of the order, and, instead, immediately began to comply with its dictates.

In order to comply with the network's discovery demands, the studios hired and trained large staffs of lawyers, paralegals, accountants, and clerks to glean relevant material from their warehouse-sized depositories of archived documents. Thousands of boxes of documents were transported to offices specially set aside and equipped by the studios for discovery purposes, where the documents were reviewed, organized, copied, and sent to the networks. The networks also subpoenaed numerous officers and employees of the studios. Seventeen of these individuals were eventually deposed over a period of more than eighty work days.

The studios filed five Status Reports during the eighteen months it took to complete document production. In these five reports, the studios kept the district court informed of the progress they were making in production, the type of services and facilities they were providing, and the costs they were incurring. The studios also reiterated to the district court and the networks their intention to seek reimbursement of costs.

On March 14, 1980, after having produced all the requested documentary material, the studios filed a motion seeking termination of discovery and reimbursement for some or all of the approximately $2.3 million out-of-pocket costs they allegedly incurred in complying with the networks' discovery demands. By minute order date March 27, 1980, the district court declared discovery complete and declined to award the studios any reimbursement. The order contained no findings of fact or conclusions of law pertaining to the denial of costs.

The studios filed a timely appeal from the March 27, 1980 minute order, arguing that the denial of any reimbursement constituted an abuse of discretion. On October 20, 1980, a motions panel of this court denied the networks' motion to dismiss for lack of appellate jurisdiction without prejudice to its renewal before the present merits panel. Final consent judgments were entered against CBS and ABC on July 31, 1980 and November 14, 1980, respectively.

II.

Appellate Jurisdiction

A. Timeliness of the motion for costs

The networks contend that the studios' motion for costs was untimely under Fed.R.Civ.P. 45(b) because it was made a year after the district court ruled on the motion to quash and after compliance with the subpoenas was virtually complete. Rule 45 provides that the district court, "upon motion [to quash or modify the subpoena] made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may . . . (2) condition denial of the motion upon the advancement . . . [of costs]." Seizing upon the language of the Rule, the networks contend that Rule 45(b) makes the "advancement" of costs available only as a "condition" of denying a motion to quash, and contains no provision for awarding costs after discovery is complete.

Under the networks' logic, in order to avoid having any right to eventual reimbursement foreclosed, a nonparty witness would have no alternative but to file a motion to quash and to demand advancement of costs as a *sine qua non* of production. This procedure would be mandatory according to the networks even where the witness is willing to produce the requested documents and where the compliance costs are not susceptible to

reasonable pre-production estimation. Moreover, because orders pertaining to motions to quash are generally interlocutory, a nonparty witness desiring review of that portion of an order declining to condition denial of a motion to quash upon advancement of costs would have to refuse to produce and be punished for contempt.[2]

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[2] In *Alexander v. United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906), the Court established the now familiar principle that for a nonparty to obtain review of an interlocutory discovery order, he must violate the order and incur contempt sanctions. *See also, Cobbledick v. United States*, 309 U.S. 323, 326, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940); *United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 1581, 29 L.Ed.2d 85 (1971). We have interpreted the Court's decisions to allow nonparties to appeal civil as well as criminal contempt orders. *See, e.g., Union of Professional Airmen v. Alaska Aeronautics Industries, Inc.*, 625 F.2d 881, 884 (9th Cir. 1980); *David v. Hooker, Ltd.*, 560 F.2d 412, 415-17 (9th Cir. 1977) (direct appeal was permitted from that portion of the order requiring the nonparty to pay costs and attorney fees as a sanction under Rule 37 because it was analogous to fines imposed for contempt); *Fenton v. Walling*, 139 F.2d 608, 610 (9th Cir. 1943), *cert. denied*, 321 U.S. 798, 64 S.Ct. 938, 88 L.Ed.2d 1086 (1944). *Accord In Re Irving*, 600 F.2d 1027, 1032 (2d Cir.), *cert. denied sub. nom, Di Lapi v. Irving*, 444 U.S. 866, 100 S.Ct. 137, 62 L.Ed.2d 89 (1979); *Kaufman v. Edelstein*, 539 F.2d 811, 813-14 (2d Cir. 1976); *North Carolina Ass'n of Black Lawyers v. North Carolina Board of Law Examiners*, 538 F.2d 547, 548-49 (4th Cir. 1976); *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969).

In contrast to the procedure applicable to a nonparty, a party's ability to seek review is contingent upon the court punishing noncompliance with criminal, rather than merely civil, contempt sanctions. *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599, 27 S.Ct. 313, 51 L.Ed. 641 (1907); *Fox v. Capital Co.*, 299 U.S. 105, 107, 57 S.Ct. 57, 58, 81 L.Ed. 67 (1936); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 906 n.2 (9th Cir. 1978). The justification advanced in *Doyle* for the disparate treatment accorded party and nonparty witnesses is that in the case of nonparties, "The proceeding is entirely independent and its prosecution does not delay the conduct of the action between the parties." 204 U.S. at 605, 27 S.Ct. at 314. For a persuasive criticism of *Doyle* and its progeny, *see* Andre, Jr., *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U.L. Rev. 1041 (1980).

Thus, a witness willing to produce would be forced to suffer contempt and to interrupt discovery, thereby indefinitely delaying trial, solely to resolve the question of entitlement to costs.

Whatever merit the networks' argument may have in the abstract, it has none of the facts of this case. The studios expressly reserved the right to seek post-compliance reimbursement in their motion to quash. The district court's March 6, 1979 order pertaining to the motion to quash contained no mention of costs. We see no reason why the court's failure to address the studios' reservation of the right to seek reimbursement constitutes an implied or *sub silentio* denial of the reservation. The court's silence, coupled with the subsequent conduct of the parties and court, is more susceptible to being interpreted as tacit approval of the reservation of the studios' right to seek post-compliance reimbursement.

Our conclusion in this regard is corroborated by several facts. First, the record contains no indication that either the court or the networks objected to, or sought clarification of why, the studios filed five Status Reports detailing, *inter alia*, the costs they were incurring during the course of document production. The record discloses a similar lack of reaction to the fact that, during the same period, the studios reiterated their intention of seeking reimbursement following production. Second, a stipulation was entered into by the studios and networks, in conjunction with the studios' post-production motion for costs, that contains no indication that the networks objected to the motion as having been previously adjudicated. The stipulation notes that the two sides were unable to settle the reimbursement issue and contains a brief synopsis of the networks' arguments on the issue, none of which included the issue of

timeliness. The stipulation was filed the day before the district court entered its March 27, 1980 minute order denying costs. Third, the language of the district court's minute order suggests that it was the first and only time the court addressed the reimbursement issue. The order provides that the "Court declines to award costs," and includes no indication that it was modifying, supplementing, or reaffirming a prior ruling on the issue.

B. *Authority to award post-compliance reimbursement*

Given that the studios expressly reserved their right to seek reimbursement and kept the court and networks fully informed of their progress and expenses throughout the lengthy production process, we discern nothing in Rule 45 that precludes post-compliance reimbursement of costs. The networks were on notice throughout the production process that the studios intended to seek reimbursement and they could easily have modified or limited their discovery demands whenever they felt that their exposure to potential reimbursement exceeded the value of requested material. Accordingly, we have little sympathy on the facts of this case for the networks' lament that deferral of a Rule 45(b)(2) determination until after compliance with a subpoena may result in grave injustice by visiting liability for costs on parties, who cannot then escape the consequences.

We conclude that the district court had authority, in its discretion, to award reimbursement in this case under either Fed.R.Civ.P. 45(b) or 26(c).[3] Rule 45 discloses a "broad congressional judgment with respect to fairness in subpoena enforcement proceedings." *United States v.*

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[3] Although the parties do not discuss Rule 26, the Rule was brought to the trial court's attention in the studios' Motion for Protective Order and Renewed Motion for Costs dated March 14, 1980.

Friedman, 532 F.2d 928, 937 (3rd Cir. 1976) (interpreting analogous provision in tax code). Consistent with this purpose, the Rule has been used creatively to require interim reimbursement and reimbursement of costs at the conclusion of discovery. *Securities Exchange Commission v. Arthur Young & Co.*, 584 F.2d 1018, 1022, 1034 (D.C. Cir.1978), *cert. denied*, 439 U.S. 1071, 99 S.Ct. 841, 59 L.Ed.2d 37 (1979); *Celanese Corp. v. E. I. duPont de Nemours & Co.*, 58 F.R.D. 606, 612 (D.Del.1973).

Rule 26(c), setting forth grounds for protective orders, was enacted as a safeguard for the protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b). 8 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2036, at 267. Subsection (c) underscores the extensive control that district courts have over the discovery process, authorizing courts to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, *or undue burden or expense*" (emphasis added). Thus, as Wright and Miller note, "a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule." *Federal Practice and Procedure, supra*, at 269, *citing Brulotte v. Regimbal*, 368 F.2d 1003, 1004 (9th Cir. 1966). To conclude otherwise would contravene the policy that the Federal Rules should be construed "to secure the just, speedy and inexpensive determination of every action." Fed.R. Civ.P. 1. We hold that, under the facts of this case, the district court had authority to award post-compliance reimbursement.

C. *Finality of the order denying costs*

Having determined that the motion for costs was timely and that the district court possessed authority to award post-compliance reimbursements, we now turn to whether

the court's March 27, 1980 minute order denying costs was an appealable final order. The Expediting Act, 15 U.S.C. § 29(a), provides that there shall be no appeal from interlocutory orders in Government antitrust actions. The standard for determining whether orders are interlocutory or final under the Expediting Act is the same as under 28 U.S.C. § 1291. *See Kaufman v. Edelstein*, 539 F.2d at 813-14.

As already noted, discovery orders are generally characterized as interlocutory[4] and review may be sought only through the contempt process or by waiting for the entry of a final judgment in the underlying action. As Professor Moore notes: "Most orders . . . denying discovery do not finally dispose of the proceeding or of any independent offshoot of it, and are, therefore, not appealable." 4 Moore's *Federal Practice* ¶ 26.83[3], at 26-585.

The studios contend that the subject order, denying post-production reimbursement of costs, should not be governed by the general finality rule. They argue that the order falls within the collateral order exception to the finality rule established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The studios emphasize that they have no other way of obtaining meaningful review because: (1) the contempt procedure was unavailable once the subpoenaed

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[4] *See* n.2, *supra*, and accompanying text. Discovery orders have been held final, however, where the pending proceeding is limited to application for discovery, such as Rule 27 orders authorizing depositions for perpetuation of testimony, or orders denying discovery in aid of execution under Rule 69, or orders disposing of letters rogatory under Rule 28. *See generally, Federal Practice and Procedure, supra*, § 2006, at 29. Similarly, an order entered in a supplemental proceeding in one district to obtain evidence for use in an action pending in another district is regarded as an appealable final order as to nonparty witnesses. *See* 4 Moore's, *supra*, ¶ 26.83[5], at 26-594 to 596.

material was produced because there was nothing they could then do to be held in contempt—i.e., it is impossible to disobey an order denying costs; and (2) as nonparties, they would be unable to test the costs issue by appeal from a final judgment in the underlying action. We address this issue by first examining the interests served by the final judgment rule.

The finality requirement is designed to balance the institutional interests of the courts in efficiency against the individual litigant's interest in obtaining prompt review. By preventing premature interference with discretionary trial court orders, the finality rule minimizes the disruption and delay of trial court functions and the strain on both the parties and judicial system caused by proliferation of appellate proceedings by piecemeal review of interlocutory orders. *See generally*, 15 *Federal Practice and Procedure: Civil*, *supra*, § 3912; 9 Moore's *supra*, at ¶ 110.07.

Consistent with these considerations, the Court has given the finality requirement a "practical rather than a technical construction," *Cohen*, 337 U.S. at 545, 69 S.Ct. at 1225, and has recognized certain exceptions to the rule. *See Forgay v. Conrad*, 47 U.S. (6 How.) 212, 214, 12 L.Ed.2d 404 (1848) (hardship doctrine); *Cohen*, 337 U.S. at 546-47, 69 S.Ct. at 1225-26 (collateral order doctrine); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S.Ct. 308, 310-12, 13 L.Ed.2d 199 (1964) (pragmatic finality). The critical inquiry in determining whether a particular order is appealable under one of these exceptions to the finality rule is not only whether the order fits neatly within the exception, but, additionally, whether appeal would be consistent with the purposes of the rule. Andre, Jr., *supra*, 55 N.Y.U.L.Rev., at 1062.

To come within *Cohen*'s collateral order doctrine "the order must conclusively determine the disputed question,

resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed. 2d 351 (1978). Although most discovery orders do not meet the requirements of the collateral order doctrine,[5] even as to nonparties,[6] the subject order clearly falls within the narrow class of orders that does.[7] First, the

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[5] *See* 9 Moore's, *supra*, ¶ 110.10. *See, generally, Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 375, 101 S.Ct. 669, 674, 66 L.Ed.2d 571 (1981) (pretrial order denying motion to disqualify opposing counsel not appealable under *Cohen*).

[6] Although the Tenth Circuit has held that an order denying a nonparty's motion to quash is appealable under *Cohen* in some circumstances, *Saunders v. Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965), that position has been explicitly rejected by this and every other circuit that has addressed the issue. *See David v. Hooker, supra. Accord Evanson v. Union Oil Co. of California*, 619 F.2d 72, 74 (Emer. Ct. App.), *cert. denied*, 449 U.S. 832, 101 S.Ct. 102, 66 L.Ed.2d 38 (1980) (citing this court's decision in *David v. Hooker, supra*); *Kaufman, supra*; *North Carolina Board of Law Examiners, supra*; *Borden Co. v. Sylk, supra*; *United States v. Anderson*, 464 F.2d 1390 (D.C. Cir. 1972); *United States v. Fried*, 386 F.2d 691 (2d Cir. 1967). *See also* 4 Moore's, *supra* ¶ 26.83[6], at 26-598 (criticizing the Tenth Circuit's position). The issue in these cases involved document production, not post-production reimbursement for costs, and the decisions are premised on the fact that the contempt process was still available to the nonparties as a means of seeking review.

[7] *See generally, In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 658 F.2d 1355, at 1356-57 (9th Cir. 1981) (order granting motion to disqualify counsel in civil case appealable under *Cohen*); *Koster & Wythe v. Massey*, 262 F.2d 60, 62 (9th Cir. 1958) (order holding plaintiff liable for marshal's costs for storage of attached property appealable under *Cohen*); *Preston v. United States*, 284 F.2d 514, 515 n.1 (9th Cir. 1953) (order refusing to impose a lien for attorney's fees *pendente lite* appealable under *Cohen*).

order denying costs was not, in the language of *Cohen*, "tentative, informal or incomplete," 337 U.S. at 546, 69 S.Ct. at 1225. The order left no issue as to costs, or as to any other matter affecting the studios' involvement in the action, "open, unfinished or inconclusive." *Id.* Second, the order resolved an issue "separable from, and collateral to, rights asserted in the action." *Id.* Because discovery against the studios was complete when costs were denied, appeal entailed no risk of delaying proceedings in the underlying action. The post-production denial of costs was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225. Third, this is not a case of merely "deferring" review, for we see no way that the nonparty studios could have protected themselves by appeal from the consent judgments eventually entered against the networks.

Accordingly, we conclude that the subject order fits well within *Cohen*'s narrow exception to the finality rule, and does so consistent with the beneficial purposes of the rule. As we stated in *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 228 (9th Cir. 1975):

> Regardless of how its holding is restated, . . . the Court in *Cohen* applied common sense to the statutory language. Congress limited our jurisdiction to review of "final decisions" not in order to deny appeal arbitrarily to some parties on some issues, but to enable all stages of litigation to be reviewed in one proceeding. [citation omitted]. If the district court has said its last word on an issue, and if its decision is of a nature that it will not be subject to review on the appeal from the final judgment of the main proceeding, then the courts will not suppose Congress to have precluded immediate appeal of that decision.

We emphasize that the studios were willing to proceed with discovery, regardless of whether they could eventually recover costs. To require that they disobey the discovery orders and incur contempt citations in order to preserve their claim to costs would be counter-productive, resulting in considerable delays in the trial process. This is in marked contrast to the more common context in which the right to discovery itself is contested. Appeal of such discovery orders, without deterrence of the contempt requirement, would result in lengthy delays of trial and multiplication of appeals. Here, however, the added efficiency of promptly proceeding with the trial more than offsets any increased burden incurred by entertaining the appeal of the order denying costs. We conclude, therefore, that the order denying costs has the requisite finality to be appealable.

III.

Nonparty Discovery Costs

Our final inquiry in this case is whether the district court abused its discretion by denying the studios any reimbursement for their substantial discovery costs. In making this determination we "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). *See also, Dart Industries Co. v. Westwood Chemical Co.*, 649 F.2d 646, 648 (9th Cir. 1980) (order barring discovery against nonparty reviewed for abuse of discretion); *In re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974) (denial of protective order under Rule 26(c) reviewed for abuse of discretion).

Our ability to engage in meaningful review is severely hampered by the district court's failure to articulate any reasons for its decision. Absent such articulation, we

can only speculate as to what factors the district court considered relevant, and are left without guidance to explore the vast expanse of this record in search of "evidence on which he rationally could have based that decision." *Dart Industries*, 649 F.2d at 648.

Although party witnesses must generally bear the burden of discovery costs,[8] the rationale for the general rule is inapplicable where the discovery demands are made on nonparties. Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they are not a party. Although we decline to curtail district courts' discretion over the discovery process by adopting the formal guidelines favoring nonparty reimbursement advocated by the studios,[9] we nevertheless emphasize that a witness's non-

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[8] *See generally, Hurtado v. United States*, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973); *In Re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306, 1308 (5th Cir. 1977); 8 J. Wigmore, *Evidence* § 2192, at 70-74.

[9] Although the Federal Rules of Civil Procedure have provided a discretionary mechanism for awarding costs for over forty years, there are few reported decisions in which the factors that should be considered in making cost awards are articulated, and even fewer such decisions involving nonparties. The studios distill four factors from the handful of district court cases in which costs have been awarded to nonparties. *See Celanese Corp. v. E.I. duPont de Nemours & Co.*, 58 F.R.D. at 611-12 (requesting party required to pay some of the nonparty's costs of production based on finding that the discovery demands were overly broad); *Collins and Aikman Corp. v. J.P. Stevens & Co.*, 51 F.R.D. 219, 221 (D.S.C. 1971) (requesting party must bear costs of *in camera* review by special master of voluminous nonparty patent files); *Novak v. General Hospital Electric Co.*, 10 F.R. Serv. 2d 1177, 1179 (S.D.N.Y. 1967) (requesting party held responsible for costs of *in camera* review of possibly privileged material obtained from nonparty). The four factors are: (1) the scope of the discovery; (2) the invasiveness of the request; (3) the extent to which the producing party must separate

party status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party.[10]

The networks argue that the district court could have found the studios' discovery costs reasonable because: the studios were "interested" in the outcome of the litigation; the studios are large corporations able to bear the burden of discovery costs; and the requested material was relevant to the networks' defense. Although these contentions, particularly the first one, have some bearing on the allowance and amount of reimbursement, we find them insufficient on the face of the present record to support the district court's unexplained decision.

First, the fact that the studios, as well as the public, stood to benefit from the Government's actions, or were in fact primary beneficiaries of the eventual consent decrees, does not alone require them to bear all the expenses of discovery. Adopting the networks' position might chill the willingness of victims of antitrust violations to cooperate with the Government if that cooperation could subject them to unreimbursed discovery as "interested" nonparties. The networks' argument also ignores the Government's uniquely independent role in antitrust enforcement. No matter how interested the studios allegedly were, they were nevertheless powerless to dictate the scope of the Government's case or the net-

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responsive information from privileged or irrelevant material; and (4) the reasonableness of the costs of production. While these considerations are important, we do not view them as inflexible or exclusive.

[10] California recently adopted a statute providing that the "reasonable costs" of a nonparty's document production "may be charged against the party who requested issuance of the subpoena duces tecum." California Code of Civil Procedure § 1987.4 (effective 1/1/81).

work's defense. Second, the fact that the studios are, like the networks, large corporations does not make the $2.3 million in discovery costs they allegedly incurred "reasonable." Absent some compelling justification, even large nonparty corporations like the studios should not be compelled to subsidize the defense of other large corporations. Finally, the fact that the nonparty discovery may have been relevant to the networks' defense does not persuade us that it is any fairer for the nonparty to bear the complete cost.

We conclude that, without guidance from the district court, the record before us affords an insufficient basis for determining whether the district court properly exercised its discretion in denying the studios any reimbursement for their discovery costs. Although we believe that, barring factors of which we are now unaware, the studios are entitled to the award of some compensation, the present record provides an inadequate basis for determining what amount if any would be reasonable. Accordingly, we remand the matter to the district court for re-examination of the issue in light of this opinion,[11] and for preparation of adequate findings of fact and conclusions of law supporting its eventual decision.

REVERSED AND REMANDED.

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[11] In exercising its discretion regarding the allowance and amount of reimbursement, the district court should consider, in addition to the factors we have already discussed, the relative recalcitrance of the studios and networks as to the discovery process generally and whether the networks can properly be considered to have prevailed under the terms of the eventual consent judgments. If reimbursement is ordered, it may also be necessary to decide whether it is appropriate and lawful to assess any portion thereof against the Government.

MARCH 27, 1980 DISTRICT COURT ORDER

CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES — GENERAL

CV 74-3599-RJK
CASE NO. CV 74-3600-RJK DATE 3/27/80

TITLE U.S.A. v. CBS and ABC

DOCKET ENTRY

PRESENT:

HON. ROBERT J. KELLEHER, JUDGE
James H. Haggard, Deputy Clerk

* * * *

PROCEEDINGS: MINUTE ORDER

I. Motion of Defendants for Order to Compel Answers to Questions Propounded to Deponent Sidney Sheinberg and for Award of Expenses; Motion of Non-Party Witnesses Sidney J. Sheinberg and MCA, Inc. for Protective Order and Monetary Sanctions Regarding Deposition of Sidney J. Sheinberg

The Court hereby ORDERS Deponent Sidney J. Sheinberg to respond to the thirty-two questions propounded by defendants. Deponent raises the objections of relevance, confidentiality, and improper mode of examination. Each of these objections is without force. Deponent has no standing to challenge relevance. As to confidentiality, the Court finds its previous Protective Orders to be sufficient here, and hence the Court chooses to make no new Protective Order here. However, as to any request by defendants that Deponent disclose any matters relating to MCA, Inc.'s future business plans, the Court will, on its own motion, sustain any objection interposed

against such a request. The Court declines to award expenses to counsel.

II. Motion of Non-Party Witnesses for Protective Order and Renewed Motion for Costs

On January 10, 1980, the Court ORDERED that all discovery in this action be completed by February 6, 1980. This deadline having passed, the Court now deems discovery to be complete. No further discovery is to take place. The Court declines to award costs.

The Clerk shall mail a copy of this Order to counsel.

INITIALS OF DEPUTY CLERK—J

MARCH 6, 1979 DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed March 6, 1979]

No. CV 74-3599-RJK

UNITED STATES OF AMERICA,
Plaintiff,
v.
CBS, INC.,
Defendant.

No. CV 74-3600-RJK

UNITED STATES OF AMERICA,
Plaintiff,
v.
AMERICAN BROADCASTING COMPANIES, INC.,
Defendant.

ORDER

The Court, having taken the motion of the United States and the motion of several concerns subpoenaed under submission, hereby orders the subpoenas duces tecum, issued by the defendants in the instant action, quashed insofar as they seek information dated prior to May 4, 1970. In addition, all subpoenas, to the extent they call for information dealing with theatrical feature film production, distribution, and exhibition in theaters, are modified to delete such requests for documents. Insofar as the motions to quash the subpoenas duces tecum relate to information dated after May 4, 1970, those motions, and each of them, are hereby denied, and all

persons to whom the subpoenas duces tecum are directed are hereby ordered to comply with those subpoenas insofar as they seek information dated after May 4, 1970.

This order shall apply to every subpoena duces tecum issued by the defendants in the above-captioned cases. The Court further orders that all documentary discovery shall be completed by no later than May 11th 1979, and directs the parties to have on file or lodged with the Clerk of the Court appropriate pre-trial papers no later than June 13th, 1979. The Court further orders the pre-trial conference in this matter set for June 25th, 1979.

The Clerk of the Court shall send, by United States mail, a copy of this Order to counsel for the parties.

DATED: March 5th, 1979.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
United States District Judge

(FORMER) FED. R. CIV. P. 30.
DEPOSITIONS UPON ORAL EXAMINATION

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1885
IN THE

Supreme Court of the United States

October Term, 1981

CBS INC. and
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

vs.

COLUMBIA PICTURES INDUSTRIES, INC., GULF + WESTERN INDUSTRIES, INC., MCA INC., TWENTIETH CENTURY-FOX FILM CORP., WARNER COMMUNICATIONS INC. and UNITED STATES OF AMERICA,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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May 24, 1982

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

In addition to the questions presented in the Petition, this case presents the following question:

Whether a decision of the Court of Appeals directing the district court to reconsider and prepare findings on an application for reimbursement of out-of-pocket costs incurred by non-parties in responding to discovery subpoenas is now ripe for review by this Court.

IDENTIFICATION OF RESPONDENTS' SUBSIDIARIES AND AFFILIATES PURSUANT TO SUP. CT. R. 28.1.

Columbia Pictures Industries, Inc.'s non-wholly owned subsidiaries and affiliates are: Afram Films Inc.; Amalgamated Film Services, Ltd.; American Motion Picture Export Company (Africa), Inc.; Film Gems Trading, Ltd.; Puerto Rican Film Services, Inc.; Warner-Columbia Film A.B.; Warner-Columbia Film S.N.C.; Warner-Columbia Film G.I.E.; Fox-Columbia Film Distributors; Warner-Columbia Filmverleih, GmbH (Germany); Warner-Columbia Filmverleih, GmbH (Austria); I/S Columbia-Warner; Columbia-Fox O.E.; Film Associates of Africa Ltd. (Kenya); Film Associates of Africa Ltd. (Tanzania); Columbia-Warner Filmes de Portugal, Lda.; Fox Col Film Distributors, Inc.; Fox Columbia Film Distributors Pty. Ltd.; MPD Leasehold Corp.; Motion Picture Export Association of America, Inc.; O.Y. Warner-Columbia Films A.B.; Columbia-Fox Servicus de Distribicao de Filmes, Ltd.; MDF, SRL (Venezuela).

Gulf + Western Industries, Inc.'s non-wholly owned subsidiaries and affiliates are: Afram Films Inc.; American Motion Picture Export Company (Africa), Inc.; Alba Waldensian, Inc.; Amfac, Inc.; Bank of New York, Inc.; Bruns-

wick Corporation; Clark Equipment Co.; Esquire, Inc.; General Tire & Rubber Co.; B.F. Goodrich & Co.; Graniteville Co.; Hammermill Paper Co.; Hayes Albion Corp.: Hollywood Park Realty; James River Corporation of Virginia; Libbey-Owens Ford; MPD Leasehold Corp.; Motion Picture Export Association of America, Inc.; Mohasco Corporation; Munsingwear Inc.; Polaroid Corporation; Sega Enterprises, Inc.; Shawmut Corporation; J.P. Stevens & Co., Inc.; T.F. de Mexico S.A.; University Group, Inc.; USA Network. In addition, various wholly owned subsidiaries of Gulf + Western Industries, Inc. also partially own companies and have interests in partnerships formed specifically for the purpose of exploiting particular musical, dramatic, literary or artistic properties which are not listed herein because Gulf + Western Industries, Inc. believes that they do not fall within the term "affiliates" or "non-wholly owned subsidiaries" as used in Rule 28.1.

MCA Inc.'s non-wholly owned subsidiaries are: Two-Beat Music Corp.; JDJN Music Corp.; MCA New Ventures, Inc.; Discovision Associates; Saticoy Technology, Inc.; Universal Pioneer Corporation; Mood Music Company, Inc.; Fontaine Music Corp.; Roncom Films, Inc.; Supreme Music Corporation; Western Costume Co.; MPD Leasehold Corp.; Afram Films, Inc.; American Motion Picture Company (Africa), Inc.; Motion Picture Export Association of America, Inc.; Cinema International Corporation N.V.; CIC International B.V.; Pincus-Gil Music Pty. Limited; Leeds Music Hans Gerig K.G.; Spoone Music Pty. Limited; Tangerine Music Pty. Limited; Leeds Musieck Holland B.V.; MCA Music Limited; Eugene Music Limited; Evita Music Limited; Jeeves Music Limited; Rowlou Music Limited; Spoone Music Limited; Valley Music Limited; Academy

Investments No. 1 Pty. Ltd.; United Video International N.V.; MCA (Paris) Ltd.; Regent Investments Pty. Limited; Town Cinema Investments Pty. Ltd.; United International Pictures B.V.; Universal-RKO; Oak Industries Joint Venture; Hotel Two Associates; T.E.M. Programs International; USA Network and Optical Programming Associates. MCA Inc. also partially owns many companies and has interests in partnerships formed specifically for the purpose of producing individual motion pictures and/or television programs which are not listed herein because of MCA Inc.'s understanding that they do not fall within the term "affiliates" or "non-wholly owned subsidiaries" as used in Rule 28.1.

Twentieth Century-Fox Film Corp. is a privately-held corporation, all of the stock of which is held by TCF Holdings, Inc. One-half of the stock of TCF Holdings, Inc. is owned by RICHCO Holdings, B.V., which in turn is owned by RICHCO N.V. TCF Holdings, Inc. has no publicly-held subsidiaries or affiliates. Twentieth Century-Fox Film Corp.'s non-wholly owned subsidiaries are: Afram Films, Inc.; American Motion Picture Export Company (Africa), Inc.; MPD Leasehold Corp.; Motion Picture Export Association of America, Inc.

Warner Communications Inc.'s non-wholly owned subsidiaries are: Afram Films Inc.; American Motion Picture Export Company (Africa), Inc.; Atari Clubs, Inc.; Atari-Europe; Atari-Wong Limited: Athwarn Music Co., Inc.; Aulecar, S.A. de C.V.; Australasian Film Hire Pty. Ltd.; Bright Music Ltd.; Bryanston Seven Arts Ltd.; Chatham Music Corp.; C.I.C.-Warner (Proprietary) Limited; Carob Productions Inc.; C.O.G.E.D.E.P. (France); Columbia-EMI-Warner Distributors Ltd.; Columbia-Warner Filmes de Portugal Limitada; Cosmos Soccer Club, Inc.; Diffusion Musicale Du Sud-Est; Distribuidores Associados de Peli-

culas Ltda; Dolmatch Publications, Inc.; Filmudlejernes Data Service ApS (FDS); Franklin Advertising Services Limited; Garden State Micro Relay, Inc.; Houston Cable TV, Inc.; Japan Records Distributing Corporation; Kenthouse Music Limited; Kirshner-Warner Bros. Music Ltd.; Leisure Development Corporation of America, Inc.; Le Medaillier Franklin S.A. (Belgium); Le Medaillier Franklin S.A. (France); Lombardo Music Corp.; MPD Leasehold Corp.; Mansfield Music Co.; Motion Picture Export Association of America, Inc.; MSC, Music Service Center Tontragervertriebs G.m.b.H.; Music Development Corporation; NASL Marketing, Inc.; New World Music Corporation; Nine Star Music Corp.; Ocean Liquors, Inc.; Orion Pictures Company Limited; Orion Pictures Company (Japan) Ltd.; OY Warner-Columbia Films, A.B.; Palm Springs Communications Corporation; Producciones WEA, S.A. de C.V.; Produzione Intercontinentale Cinematografica S.p.A.; Record Service Benelux Breda; Rodart Music Corporation; Rosemeadow Publishing Corp.; Shubert Music Publishing Corporation; Surprise Music Corp.; Vernon Music Corp.; WEA-Filipacchi Music S.A.; WEA Musik GmbH; Warner Amex Cable Communications, Inc.; Warner Amex Cable Communications of Austin/Scottsburg, Inc.; Warner Amex Cable Communications of Cincinnati, Inc.; Warner Amex Cable Communications of Lynn, Inc.; Warner Amex Cable Communications of St. Louis, Inc.; Warner Amex Cable Communications of St. Paul, Inc.; Warner Bros. Music (Italy) S.r.l.; Warner Cable Corp. of Pittsburgh; Warner-Columbia Film A.B.; Warner-Columbia Filmverleih GmbH; Warner Concepts Ltd.; Warner & Metronome Film Aps; Warner-Pioneer Corporation; Weill-Brecht-Harmes Company Inc.; Western Costume Co.; Western Costume, S.A.

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Federal Rules of Civil Procedure, Rule 45(b) 4, 8

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No. 81-1885

IN THE

Supreme Court of the United States

October Term, 1981

CBS INC. and
AMERICAN BROADCASTING COMPANIES, INC.,
Petitioners,

vs.

COLUMBIA PICTURES INDUSTRIES, INC., GULF + WESTERN INDUSTRIES, INC., MCA INC., TWENTIETH CENTURY-FOX FILM CORP., WARNER COMMUNICATIONS INC. and UNITED STATES OF AMERICA,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents are five non-party witnesses[1] (collectively the "CPI Respondents") subpoenaed by Petitioners CBS Inc. ("CBS") and American Broadcasting Companies, Inc. ("ABC") (collectively the "Networks") to provide both testimony and extensive document discovery in antitrust actions brought by Respondent United States against CBS and ABC.

[1]Columbia Pictures Industries, Inc., Gulf + Western Industries, Inc., MCA Inc., Twentieth Century-Fox Film Corp. and Warner Communications Inc.

STATUTES AND RULES INVOLVED.

In addition to the statutes and rules set forth in the Petition, the case also involves Rule 1, Federal Rules of Civil Procedure, which provides in pertinent part:

> "These rules . . . shall be construed to secure the just, speedy and inexpensive determination of every action."

STATEMENT OF THE CASE.

Petitioners seek review of a decision of the United States Court of Appeals for the Ninth Circuit reversing and remanding for reconsideration a March 27, 1980 order of the district court which denied reimbursement of any part of $2.3 million in non-party costs incurred by the CPI Respondents in complying with discovery requests issued by the Networks.

1. The Network Antitrust Cases.

On December 10, 1974, the Government filed three virtually identical antitrust complaints against National Broadcasting Company, Inc. ("NBC"), CBS and ABC, challenging various network practices in acquiring prime time television programming from independent producers. Among the principal victims of these alleged practices were the CPI Respondents.

On November 28, 1977, the district court entered a Final Judgment in the action against NBC based on a Consent Decree. From 1974 through August 1978, there was limited discovery in the CBS and ABC cases. The proceedings consisted principally of motions by the defendants testing jurisdiction and the legal sufficiency of the Government's case. On October 26, 1978, the district court entered its Memorandum of Decision and Order which denied CBS's and ABC's motions to dismiss certain Government allegations and attempted to formulate a "blueprint for the

remaining pretrial stages." In that Memorandum of Decision and Order, the district court reaffirmed its prior order of March 29, 1978, which required that deposition discovery be completed by December 31, 1978. CR 19.[2]

2. The CPI Respondents' Motion to Quash.

In August and September 1978, in response to the discovery cutoff, CBS and ABC served subpoenas duces tecum and subpoenas ad testificandum upon the five CPI Respondents and seventeen of their individual officers and employees. The Networks also subpoenaed almost every other independent producer and distributor of television programs, serving over one hundred subpoenas on non-party companies or individuals. The document discovery requests were staggering: they sought production of nearly every document in the CPI Respondents' control relating to television or theatrical feature film production since 1970 and, in some cases, even earlier.[3] CR 6-9, 12-13. Subpoenas seeking detailed financial, planning and tax information were served on the independent accountants for each of the CPI Respondents.

On September 29, 1978, the Government filed a motion to quash what it termed the "last minute" Network subpoenas, arguing that their enforcement "would obviously remove any possibility that the discovery cutoff date could be met" and would result in about a two year delay of the trial. CR 16, 17.

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[2]Citations to the Clerk's Record filed with the Court of Appeals are in the form "CR ...," and citations to the Reporter's Transcript filed with the Court of Appeals are in the form "RT ...."

[3]For example, the subpoenas sought licensing agreements for television programs, negotiators' notes and files, marketing plans for television and feature films, financial reports and supporting documents, labor negotiating files, and even compensation records for individual performers, officers and executives.

On October 31, 1978, after unsuccessful efforts to negotiate more limited subpoenas, the CPI Respondents filed a motion to quash the subpoenas on the grounds that they were "unreasonable and oppressive" under Fed. R. Civ. P. Rule 45(b). CR 19. The CPI Respondents asked the court to quash the subpoenas, order the parties to proceed with depositions, and limit future subpoenas to "clearly relevant materials" and documents not already in the Networks' possession. At pages 17-18 of the Memorandum of Points and Authorities in Support of Motion to Quash, the CPI Respondents stated that they "reserve all rights to seek . . . the costs of search, review and copying" from the Networks. CR 19. Neither the Networks nor the district court took issue with this reservation. In two later briefs on the motion, the CPI Respondents urged the district court to require CBS and ABC to pay at least some of the discovery costs being incurred by the non-parties as an incentive to more efficient and reasonable discovery. CR 31, 64.

On March 6, 1979, the district court ruled on the CPI Respondents' motion to quash. The court narrowed somewhat the scope of documents required to be produced to CBS and ABC and ordered that production be completed by May 11, 1979. CR 32. The district court neither mentioned nor ruled on the CPI Respondents' proposal that awarding costs would help limit discovery burdens, nor did the court rule on the CPI Respondents' reservation of the right to request reimbursement of their costs. Various later orders clarified the March 6, 1979 order with respect to the scope of discovery and eventually extended the time for compliance to January 1980. CR 32, 43.

3. Discovery Expenses of the CPI Respondents.

Even under the subpoenas as narrowed by the district court, document discovery from the CPI Respondents was monumental, taking on the dimensions of a small industry.

To meet the discovery deadlines, the CPI Respondents hired and trained additional lawyers, law clerks and paralegals, eventually totaling more than one hundred twenty people, solely to produce documents to CBS and ABC. CR 31, 44. These staffs reviewed warehouses of documents to identify relevant files and conducted tours of records storage facilities for counsel for the Networks in an attempt to narrow the search to relevant documents. High-ranking financial executives voluntarily met with the Networks' counsel and accounting consultants to explain the CPI Respondents' procedures for generating and retaining financial information. RT of 6/11/79 at 16-18 & 21-23. CR 62.

The CPI Respondents also provided office space, ranging from warehouses to boardrooms and rented office trailers, for use by both the CPI Respondents' internal production teams and the large staff of lawyers, accountants and clerks retained by the Networks. Some of the CPI Respondents operated document production facilities both in New York and Los Angeles. The CPI Respondents installed copying machines, new telephone lines and higher voltage electrical wiring to facilitate the use of copying machines by the Networks.[4]

In addition to document discovery, the Networks deposed seventeen officers and employees of the CPI Respondents in 1978-1979, and took additional depositions of nine employees in 1979-1980. Deposition testimony by the CPI Respondents' executives, including current and former chief executive officers, lasted approximately eighty days.

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[4]*See* Affidavit of Janet Acquaro filed February 26, 1979 at ¶¶ 5-9. CR 31. *See*, Affidavits filed in support of motion for costs (Benjamin at ¶¶ 3, 5; Stager at ¶¶ 3, 5; Horan at ¶ 3; Acquaro at ¶¶ 3, 4; Duke at ¶ 3; Hoffman at ¶¶ 3, 5; Sorkin at ¶¶ 3, 4). CR 44.

In five status reports and other briefs filed during the eighteen months of discovery, the CPI Respondents kept both the district court and opposing counsel advised of the scope and rate of document production, the type of services and facilities provided to the Networks by the CPI Respondents, the level of staffing provided by the CPI Respondents and the costs incurred. CR 29-31, 33, 34, 36, 65. The CPI Respondents continued to assert their intention to seek cost reimbursement without objection by either the court or opposing counsel. CR 31, 64. Document discovery was completed early in January 1980.

4. The CPI Respondents' Motion for Costs.

On March 14, 1980, after document production had been completed, the CPI Respondents filed a Notice of Motion and Motion for Protective Order and Renewed Motion for Costs (the "Motion for Costs") seeking, *inter alia*, (1) a discovery cutoff with respect to both further requests for depositions and documents, and (2) reimbursement of some or all of approximately $2.3 million in out-of-pocket costs incurred by the CPI Respondents in complying with discovery requests of CBS and ABC. CR 44. The Affidavits in support of the Motion demonstrated the following costs:

	Salaries[5]	Facilities	Accountants	Outside Counsel	Total
Columbia Pictures Industries, Inc.	$143,916	$ 43,154	$35,000	$169,949	$ 392,019
Gulf + Western Industries, Inc.	79,200	153,325	42,000	166,579	441,104
MCA Inc.	94,841	60,814	65,500	129,732	350,887
Twentieth Century-Fox Film Corp.	154,000	38,000	10,000	123,000	325,000
Warner Communications Inc.	158,250	56,867	41,830	484,591	741,538
					$2,250,548[6]

[5]These are personnel costs for individuals employed specifically to aid in responding to the subpoenas duces tecum.

[6]This table is based on the figures supplied in the affidavits filed in support of the Motion for Costs. CR 44. In addition to these costs, the

(footnote continued on following page)

The CPI Respondents' Motion for Costs argued that fairness required the Networks to bear at least part of the cost of the extraordinarily burdensome discovery.

5. The Minute Order of March 27, 1980.

On March 27, 1980, the district court entered a Minute Order (hereinafter the "March 27, 1980 order") which declared discovery completed and denied any reimbursement for costs sought by the CPI Respondents. No reason was stated for denying the request for costs. CR 48.

6. The CBS and ABC Final Judgments.

The Networks settled their cases shortly after the March 27, 1980 order. On May 8, 1980, CBS and the United States lodged a proposed Final Judgment with the district court, along with a Stipulation and Order and a Competitive Impact Statement, pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(b)-(h). CR 53. The CBS Final Judgment was entered by the district court on July 31, 1980. CR 57. On August 22, 1980, ABC and the United States lodged a similar proposed Final Judgment, Stipulation and Order and a Competitive Impact Statement. CR 58, 59. The ABC Final Judgment was entered by the district court on November 14, 1980. CR 61.

CPI Respondents incurred additional substantial costs in the form of business interruptions because of the time spent by high-ranking executives who were interviewed and deposed, as well as the disruption of business files for document production. No reimbursement was requested for the cost of business interruption.

Both the CBS and ABC Final Judgments tracked the NBC Final Judgment. With only minor exceptions,[7] CBS and ABC settled with the United States on terms virtually identical to those on which NBC had settled three and one-half years before.

7. The Opinion Below.

On January 22, 1982, a unanimous panel of the Court of Appeals for the Ninth Circuit issued its opinion reversing the March 27, 1980 order and remanding the action for further proceedings. The Court of Appeals decided three issues. First, it held that the Motion for Costs had been timely under Fed. R. Civ. P. 45(b), noting that the CPI Respondents had expressly reserved their right to seek post-compliance reimbursement. The Court of Appeals also relied on the fact that during eighteen months of document production, neither the trial court nor the Networks had objected to the CPI Respondents reserving the right to seek costs or filing five status reports and other briefs reporting on costs and asserting the right to seek reimbursement. Second, the Court of Appeals also held that under either Rule 45(b)(2) or Rule 26(c), the district court had discretion to award reimbursement after compliance as a safeguard for

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[7]There are four differences between the CBS and ABC Decrees and the NBC Final Judgment: (1) The terms relating to limitations on long-term options provide for slightly more flexible negotiating periods in the CBS and ABC Decrees; (2) CBS and ABC are barred from using long-term agreements with writers, directors and performers to appear only on CBS or ABC in order to prevent talent from "moving" with the series which has been dropped by CBS or ABC but is then licensed to another network within 90 days; (3) ABC is barred from using exclusive long-term talent contracts to prevent writers, directors and performers involved in pilots delivered to ABC from rendering services in that series if the series is eventually licensed to another network; and (4) ABC may broadcast more hours of ABC-produced programming than CBS or NBC is permitted under their respective "internal production" quotas.

the protection of non-parties. Third, the Court of Appeals held that the March 27, 1980 order was an appealable collateral order within the rule established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it left no issue related to costs undecided, because the issue of costs was independent of the main action and because the CPI Respondents had no other means of review.

Finally, the Court of Appeals declined to rule on whether the district court had abused its discretion in denying any reimbursement. It noted that its review was hampered by the district court's failure to articulate any reasons for its decision. Accordingly, the Court of Appeals ordered the case remanded to the district court for reconsideration, including preparation of findings of fact and conclusions of law.

REASONS FOR DENYING THE WRIT.

None of the reasons for issuance of a writ of certiorari urged by Petitioners are valid. First, the decision below was a correct application of Rules 26(c) and 45(b)(2), and review of the decision, even if ultimately warranted, is premature until the district court has completed the proceedings on remand. Second, there is no conflict between the decision below and the easily distinguishable decision reached 18 years ago by the Court of Appeals for the Tenth Circuit under a different statute and a different, now wholly revised, Federal Rule of Civil Procedure. Finally, the Court of Appeals' conclusion that the March 27, 1980 order was final and appealable is consistent with the letter and the principle of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

1. The Decision Below Was Correct on the Facts Presented.

As the Court of Appeals held, "Whatever merit the networks' argument may have in the abstract, it has none on the facts of this case." *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368 (9th Cir. 1982). This was not a case where the Networks were surprised by the request for reimbursement or the scope of the costs incurred; their own counsel worked with the CPI Respondents' personnel in the document production for weeks on end. The Networks were served with briefs and status reports confirming the CPI Respondents' intention to ask for costs and detailing the level of costs being incurred. The Court of Appeals correctly concluded from the record before it that the CPI Respondents' reservation of the right to seek costs was timely and unopposed. Moreover, because both Rules 26(c) and 45(b)(2) embody broad policies favoring fairness in enforcing the burdens and costs of compliance

with subpoenas,[8] the Court of Appeals properly found that the district court had the authority to award costs after compliance had begun. As the Court of Appeals noted below, to conclude otherwise would contravene the policy that the Federal Rules should be construed " 'to secure the just, speedy and inexpensive determination of every action.' " 666 F.2d at 369.

Petitioners wrongly assert that this case raises important questions concerning the conduct and allocation of costs of discovery in complex litigation. Whether it raises such questions depends upon the proceedings before the district court on remand. Although the Court of Appeals articulated certain considerations to guide the distribution of discovery burdens, the district court has made no findings of fact or conclusions of law on the award or denial of costs. Even if this Court were inclined to address the question of the scope of district courts' discretion to regulate discovery burdens on non-parties and to award costs of discovery to non-parties, the CPI Respondents respectfully submit that the Court should wait until the issue is ripe for review. *See, e.g., American Tobacco Co. v. Patterson*, 50 U.S.L.W. 4364, 4368 at n.18 (U.S. April 5, 1982); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). If the district court awards costs on remand, Petitioners can again seek review in the Court of Appeals and in this Court upon a fully developed record.[9]

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[8]*See, e.g., Sec. & Exchange Com'n. v. Arthur Young & Co.*, 584 F.2d 1018, 1032-34 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *United States v. Friedman*, 532 F.2d 928, 973 (3d Cir. 1976) (interpreting similar provision of tax code).

[9]Because the factual and legal questions raised by consideration of a request for reimbursement of $2.3 million in costs are likely to be substantial, it is not unfair to require CBS and ABC to present their evidence and arguments to the district court for its considered decision before this Court is called upon to review the case.

2. There Is No Conflict Between the Opinion Below and the Tenth Circuit Opinion Cited by Petitioners.

Petitioners urge that the opinion below conflicts with the decision of the Court of Appeals of the Tenth Circuit in *United States v. Portland Cement Co. of Utah*, 338 F.2d 798, 803 (10th Cir. 1964), which involved a taxpayer's action against the United States for a refund of income tax under the depletion allowance for the mining of cement rock.

In the *Portland Cement* case, the Government served notice of depositions under former Rule 30(a), and the taxpayer requested that the depositions be conditioned upon the assessment of costs if the taxpayer prevailed. The district court made no order, the depositions were taken, and the taxpayer prevailed. The taxpayer then moved for and was awarded costs for the travel expenses of its counsel and consultants in connection with the depositions, as well as the cost of deposition transcripts. The Court of Appeals reversed the award of costs on two grounds: first, the language of 28 U.S.C. § 2412(b) then in effect limited costs awarded against the United States to costs "actually incurred for witnesses and fees paid to the clerk."[10] Although this ground disposed of the issue, the Court of Appeals went on to hold that costs were improperly awarded because the taxpayer had failed to obtain its protective order assessing costs prior to the depositions. Because the holding that former § 2412(b) barred the award of costs is dispositive, the language concerning former Rule 30(b) appears to be mere *dicta*. In any event, there are many factors distinguishing the cases: *Portland Cement* involved discovery between parties — not from non-party witnesses. As the Court of

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[10]The former language of 28 U.S.C. § 2412(b) is found at Appendix A.

Appeals noted below, the general rule that a witness must bear his own discovery demands is inapplicable to non-parties like the CPI Respondents who are "powerless to control the scope of litigation and discovery." Moreover, the taxpayer in *Portland Cement* did not argue that the discovery was burdensome, and it had not specifically reserved the right to seek costs after compliance, as the CPI Respondents did here. Finally, the taxpayer sought costs from the United States, a request governed by a specific statute which does not apply to the Networks.

The CPI Respondents respectfully submit that an eighteen-year old decision under a statute and a rule, both of which have since been substantially rewritten, and neither of which is involved in this case, does not give rise to a "conflict" warranting issuance of a writ of certiorari.

3. The Court of Appeals Properly Concluded That the March 27, 1980 Order Denying the Motion for Costs Was a Final, Appealable Order.

Petitioners argue that the Court of Appeals improperly applied the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Petitioners argue that the CPI Respondents' right to cost reimbursement was determined not by the March 27, 1980 order denying the Motion for Costs, but by the March 6, 1979 order on the motion to quash. They contend that the CPI Respondents should have sought review of the March 6, 1979 order either by disobeying the order to comply with the subpoenas, being held in contempt and then appealing, or by appealing the order directly.

The fundamental flaw in this argument is that the March 6, 1979 order was silent on the issue of costs; it merely modified the subpoenas. There was no need for the CPI Respondents to refuse to produce documents and suffer con-

tempt, especially when they were willing to comply with the modified subpoenas, having reserved their right to seek costs in the motion to quash. CR 21 at 17-19. Moreover, because the March 6, 1979 order did not address the issue of costs, the CPI Respondents could not have sought direct appeal of that order to raise their right to reimbursement.

The only district court order expressly deciding the right to costs was the March 27, 1980 order denying the CPI Respondents' Motion for Costs. In determining whether that order is a "final" decision under 28 U.S.C. § 1291, the requirement is to be given a "practical rather than a technical construction.' " *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964), *quoting Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 549 (1949).

Viewed as a practical matter, the March 27, 1980 order was clearly the final determination of the CPI Respondents' right to cost reimbursement. It left nothing further to be decided. Moreover, the issue of non-party cost reimbursement is clearly independent of the main action. As non-parties, the CPI Respondents could not raise the issue of their right to costs in any appeal from the final judgments entered below. Thus, the CPI Respondents had no other means of obtaining review of the collateral issue of cost reimbursement except by direct appeal from the March 27, 1980 order. In effect, the tortured paths to review urged by Petitioners would "deny all opportunity for the appeal contemplated by the statutes." *Cobbledick v. United States*, 309 U.S. 323, 329 (1940).

Finally, Petitioners' threatened "flood of interlocutory appeals" appears to be a single drop: this case.[11] The Court of Appeals took pains to note that "Although most discovery orders do not meet the requirements of the collateral order doctrine, even as to non-parties, the subject order clearly falls within the narrow class of orders that does." 666 F.2d at 370.

CONCLUSION.

For the foregoing reasons, this Court should decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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May 24, 1982

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[11]It is unique principally because of the procedural history and the tenacity of the CPI Respondents in vindicating their rights. Unfortunately, other non-parties subject to enormous discovery burdens — including many of those subpoenaed in these cases — have apparently been deterred from seeking costs for discovery because of the reluctance of courts to control pretrial discovery and to enforce penalties for its abuse. For an example of dragnet discovery not limited by the court, *see United States v. International Business Machines Corp.*, 18 F.R. Serv. 2d 348 and 1060 (S.D.N.Y. 1974).

Appendix

APPENDIX A.

(Former) 28 U.S.C. Section 2412.

§ 2412. **Costs**

(a) The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.

(b) In an action under subsection (a) of section 1346 or section 1491 of this title, if the United States puts in issue plaintiff's right to recover, the district court or Court of Claims may allow costs to the prevailing party from the time of joining such issue. Such costs shall include only those actually incurred for witnesses and fees paid to the clerk.

(c) In an action under subsection (b) of section 1346 of this title, costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys' fees.